United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4116

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-4116

General Electric Company,
Petitioner,

v.

Occupational Safety and Health Review Commission
and John T. Dunlop, Secretary of Labor,

Respondents,

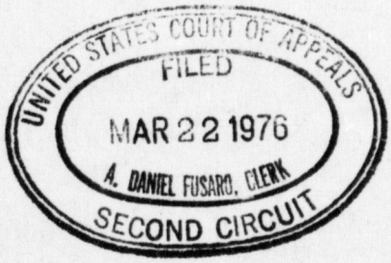
and

International Union of Electrical, Radio and Machine
Workers, AFL-CIO-CLC and its Local No. 301,

Intervenors.

On Petition For Review Of An
Order Of The Occupational Safety
and Health Review Commission

BRIEF FOR INTERVENOR



Winn Newman
Ruth Weyand
Boren Chertkov
1126 16th Street, N. W.
Washington, D. C. 20036
Telephone No. 202 296-1200

Counsel for Intervenors

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the Commission properly found that the General Electric Company violated the safety standards regarding protection from falling (29 C.F.R. 1910.23(c)(1)) and eye protection (29 C. F.R. 1910.133(a)(1))?

2. Whether the Commission properly found that the General Electric Company's violation of the protection from falling standard was "willful serious", and violation of the eye protection standard was "repeated serious"?

COUNTERSTATEMENT OF THE CASE

I. Introduction

This case is before the Court upon the petition of the General Electric Company (hereinafter referred to as the "Company" or "G.E.") to review just two narrow aspects of a multifaceted Decision of the Occupational Safety and Health Review Commission, OSHRC Docket No. 2739, CCH 1974-1975 O.S.H.D. Para. 19, 567 (1975). In its Decision, the Commission found that the Company had violated numerous safety and health standards promulgated under the Occupational Safety and Health Act of 1970, 29 U. S. C. Sec. 651 et seq.(1970) (hereinafter "the Act"). G. E. here requests review only of the finding that it violated the 29 C.F.R. 1910. 23(c)(1) fall protection standard with regard to just one item, thereby admitting its violation of two other items; and that it violated the 29 C.F.R. 1910.133(a) eye protection standard. (Hereinafter, safety and health standards promulgated under the Act and published at 29 C. F. R. 1910. et seq.will be cited only by the number following the decimal. e.g. 23(c)(1)).

The Intervenor[1/], the International Union of Electrical, Radio

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1/ By Order dated August 26, 1975, this Court granted the Union's motion for leave to intervene after considering and rejecting General Electric's opposition thereto. The Union's Memorandum to the Court sets forth the factual and legal basis for granting its motion to intervene.

and Machine Workers, AFL-CIO-CLC, and its Local 301 (hereinafter the "Union"),represents a majority of the production and maintenance employees at the Company's Schenectady, New York facilities involved in this proceeding. As such, the Union is an authorized employee representative of employees as defined by the Act, and it has exercised its various rights under the Act, including that of full party status in this litigation.[2/]

In view of the Commission and Secretary of Labor's announced participation in this review case, the Intervenor presumes that the Commission and the Secretary will present to this Court the facts and law which support those portions of the Secretary's action and Commission's Decision which the Company has requested review. As we do not wish to burden the Court by traversing the same ground twice, we refer the Court to the Respondent's brief for a statement of that phase of the case.

In our brief, the Intervenor Union will set forth the record facts and Commission findings to the extent they bear upon the Company's attempted obfuscation of the role the union and employees fulfilled in attempting to obtain the safe and healthy working conditions that Congress intended to assure under the Act. Specifically, General Electric's various allegations

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2/ OSHRC Rule 1(g) (29 C.F.R. 2200.1) defines the term "authorized employee representative" that appears in Sec. 10(a) of the Act (29 U.S.C. 659(a)) as, "a labor organization which has a collective bargaining relationship with the cited employer and which represents affected employees". General Electric recognized that the Union herein meets that definition (Answer to Complaint, para. XVII).

that it did not violate the Act, or if it did, that its violations were isolated and not repeated or willful, are premised on inaccuracies in its Statement of the Case which we will show, together with how the record fully supports the Commission's findings.

II. The Record Facts

A. History and Background of General Electric's Violations of the Occupational Safety and Health Act of 1970

The Company seeks review of only two items of OSHA violations found by the Commission, and makes little mention of the numerous citations establishing various classifications of non-serious, serious, repeated and willful safety and health standards violations that have been issued against them by the Occupational Safety and Health Administration. Yet, with the exception of just the two items involved in this proceeding, all previous findings of violations of the Act have become final Orders of the Commission, as they were not appealed either to the Commission or to the Court of Appeals (29 U.S.C.661(i)).

The Commission was aware of this background of violations, noting that General Electric "has a history of both non-serious and serious violations which are final orders of this Commission spanning a fifteen-month period prior to the March 1973 inspection" (OSHRC Decision, p. 47). This Commission finding is well supported by the Record, and as will be shown, is relevant to a review of this case.

The Act was signed into law on December 29, 1970 and became effective on April 28, 1971. Since that time, OSHA Compliance

Safety and Health Officers ("CSHO's") have conducted numerous investigations, inspections, and compliance activities at Respondent's Schenectady facilities. Inspections relevant to the various Commission determinations in this case were conducted on December 2, 1971; February 29, 1972; October 2, 1972; and March 12, 1973 (Exs. C-1-4).[3/]

The most immediate inspection prior to the hearing occurred on March 21 and 22, 1973. Following that inspection, the Secretary issued, on April 13, 1973, a total of seventeen citations together with Notification of Proposed Penalties amounting to $14, 800 as follows: six for serious violations; one for willful serious; one for serious repeated; six for nonserious; and, three for repeated nonserious.

3/ Although other OSHA inspections and investigations may have been conducted at G. E. facilities in the fifteen month period noted by the Commission, the violations cited by OSHA were not involved in this particular proceeding, and thus not made a part of the Record in this case. Similarly not a part of the Record in this proceeding, although now officially reported, are the results of a subsequent inspection conducted in Schenectady on October 1, 2 and 4, 1974, that caused the issuance of more than thirty citations which were initially contested by General Electric, Settlement negotiations with the Secretary of Labor precipitated the Company's withdrawal of such notice for all but four items which have now been called for review, and briefed by all parties, before the Review Commission. (OSHRC Docket No. 11344, Decision of Judge Cronin filed August 6, 1975, Order for Review issued August 18, 1975).

Significantly, the Secretary found on his inspection on March 21 and 22, that General Electric was violating some of the very same standards that it had been found to have violated in the past. Specifically, the prior enforcement history reveals that on December 2, 1971, G. E. had been found to have violated, inter alia, 22(a)(1), 23(c)(1), 133(a)(1), and 157(a)(5) standards; on the February 29, 1972 inspection, G. E. had been found to have violated, inter alia, the 157(a)(5) standard; on the October 2, 1972 inspection, G.E. had been found to have violated, inter alia, the 252(e)(2)(iii) standard; and, on March 12, 1973, G. E. had been found to have violated, inter alia, the 23(c)(1) and 157(a)(2)(3) standards (OSHRC Decision, p.24).

The two citation items that G. E. now requests this Court review both involved violations of safety and health standards for which it had been cited prior to this case, and in each instance, G. E. did not contest the earlier citations, including a previous violation of the 133(a)(1) eye protection standard, and two previous violations of the 23(c)(1) fall protection standards. Furthermore, the Company chose not to appeal the Commission findings in this case that it violated 23(c)(1) in two other respects found to be violative during the inspection of March 21-22, 1973, and affirmed by the Commission (OSHRC Decision, pps. 35-38), or its violations of 252(e)(1)(i), a standard similar in purpose to 23(c)(1)

that is designed to protect welders (rather than all employees generally) from falling from high work places (see OSHRC Decision, p. 27-29,for its findings on these related standards violations).

This record of past violations of safety and health standards is an integral part of the various Commission determinations in this case, and together with the various employee initiatives under the Act, cannot be ignored as the Court narrows its focus to just the two items that G. E. now seeks review.

B. Employee Initiatives Under The Act and In This Proceeding

The Act clearly establishes that employees as well as employers have definite responsibilities in making certain that the health and safety of America's workforce is protected. The employees' role is defined in Sec. 2 of the Act (29 U.S.C. 651(b)(1),(2),(3)).

> "The Congress declares it to be its purpose and policy ...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions...
>
> "(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;
>
> "(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;
>
> "(3) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment."

The entire statutory scheme provides for employee participation in the enforcement process where decisions affecting health and safety are made. Thus, employees acting by themselves or through a union representative may submit complaints of violations to the Secretary (Sec.8(f)(1); 29 U.S.C. 657(f)), participate in walk around inspections (Sec.8(e); 29 U.S.C. 657(e)), and receive an explanation of the refusal by the

Secretary to issue a citation in a given case (Sec.8(f)(2), 29 U.S.C. 657(f)(2)). They are entitled to participate in any effort by the employer to contest the imposition of a citation, penalty, or period of abatement, as the Act vests employees with full party status (29 U.S.C. 659(a)). See also OSHRC Rules 7 and 20, 29 C.F.R. 1910.2200). In addition, employees may contest the period of abatement if they believe that such period is incorrect (Sec. 10(c) 29 U.S.C. 659), and may file petitions for rule-making (29 U.S.C. 655). The Act protects them from employer discrimination on account of their assertion of rights under the Act (Sec. 11(c), 29 U.S.C. 660).

The Union has taken its responsibilities under the Act seriously. Realizing that the Act presented the mandate and the potential for joint cooperation between employers and employees in assuring safe working conditions free from hazards, the Union appointed a Safety Director, Larry Rafferty, who by letter to G. E. Manager D. H. Guilbault on October 11, 1972, offered to establish a "line of communication. . . pertaining to matters of safety and health" (Ex.P-1).

General Electric's letter in response to the Union's expression of interest was less than enthusiastic when viewed in the context of the Act's requirements. Thus, on October 30, E. J. Alzapiedi, who is understood to be an assistant to

D. C. Hay, Manager of Union Relations for the entire Schenectady operation, replied to Joseph Mangino, Business Agent of the Union, setting forth procedures for communication (Ex.P-2).

First, the Respondent determined that "all contacts on safety matters between Local 301 and the Company (would) remain with the Union Relations organization." Clearly the Company's policy was to limit direct contact between safety personnel and union personnel.

Second, G. E. placed limitations on the rights of the authorized employee representative to investigate the extent to which working conditions were free of hazards. Specifically, G. E. determined that Rafferty must give a department manager "at least 24 hours" notice before conducting a visit to a building. Other procedures, in cases of emergency, were also outlined (Ex.P-2).

The Union complied with the limitations and restrictions placed on its Safety Committee efforts and proceeded with its safety program. This, among other things, consisted of making inspections at the request of the Union's board member that represented employees in a particular building, and listing violations of OSHA standards as they saw them (Tr.1-281).

The results of these inspections were submitted into evidence (Ex. C-16 through C-23)[4/].

Following each inspection, a report was prepared by Rafferty and his staff, and promptly submitted to G. E. in the hope that remedial action would be taken (Tr. 1-282). Thereafter, meetings between the Union and G. E. were arranged for the purpose of discussing the various violations in the context of whether G. E. admitted they existed, and if so, when they would be abated (Tr. 1-293). In some cases the Company would immediately answer the Union's inquiries, but in others, there was a delay of several weeks while the Company's Union Relations personnel conferred with the Company's Safety Personnel (Tr. 1-423). Upon re-meeting, the Company's Union Relations personnel would read their responses to the various violations cited by the Union, admitting some, denying others, and announcing plans for abatement of others (Tr. 1-427). The written materials used by G. E. to make the oral reports at those meetings were never made available to the Union, notwithstanding its request, but notes of the meetings were kept by the Union and have been submitted into evidence in these proceedings together with the inspection reports (Tr. A-428,

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4/ A summary of the violations identified by the Union and pointed out to the Company, that relate to this case, is reproduced at page 8 of the Union's Post Hearing Brief to the Administrative Law Judge.

Ex. C-16 through C-23).

The Union fully believed that its efforts constituted an approach most amenable to a swift and painless remedy of OSHA violations it cited during its inspection and brought to the Company's attention. In the interest of good faith, it exhausted all voluntary remedies before resorting to the mandatory provisions of the Act.

Frustrations with the delay involved with this effort, together with G. E.'s chosen course of ignoring the warnings of the Union that specific violations of OSHA existed, or the inadequacy of G. E.'s response, caused the Union to report its findings and efforts to OSHA officials in Syracuse, and New York City (Tr. 1-428). Correspondence and reports of those meetings were the subject of testimony by Mr. Rafferty (Tr. 1-428).[5/]

Following the filing of an OSHA-7 complaint by the Union, OSHA Compliance officials Nead and Bernard conducted an inspection of the Company's Schenectady facilities on March 21-22, 1973. During the course of their inspection, in addition to reviewing some of the matters that had been previously raised by the Union, the Union pointed out additional

5/ The transcript, pages 1-267 through 1-305, and 1-413 through 1-433, contains a detailed accounting of the Union's various initiatives.

violations. As provided by OSHA Rules, "During the course of an inspection, any employee shall be afforded an opportunity to bring any violation of the Act which he has reason to believe exists in the workplace to the attention of the Compliance Safety and Health Officer" (29 C.F.R. 1903.10).

On April 13, 1973, seventeen citations and penalty notices were issued (OSHRC Decision, pps. 1-2). General Electric served Notice of Contest of all the Citations and Notification of Proposed Penalties on April 17, 1973, and the case was transferred to the Commission. The Union immediately filed a request to participate as a party at the hearing pursuant to OSHRC Rule 20(a), 29 C. F. R. 2200.20(a), and requested an expedited proceeding purusuant to OSHRC Rule 101(a), 29 C.F.R. 2200.101. Although G. E. filed a response in opposition to the request on April 25, 1973, an expedited hearing was granted by the Commission.

The hearing was held in Schenectady, New York on June 19-21, and 25-27, 1973; and, the Union exercised its statutory right (29 U.S.C. 659(a)) to full party status, preserved by the Review Commission's Rules of Procedure with respect to various justiciable issues. Thus, OSHRC Rule 20 provides that "affected employees may elect to participate as parties at any time before the commencement of the hearing before the

judge..." 29 C.F.R. 2200.20(a). This rule is based on Section 10(c) of the Act which provides that when a hearing is held upon the filing of a notice of contest by the employer,

> (t)he rules of procedure prescribed by the Commission shall provide affected employees or representative of employees an opportunity to participate as parties to hearings under this subsection (29 U.S.C. 659(c)),

Thus, the Union's full part status differs from that of a non-party intervenor, and are statutorily mandated. 6/

On November 19, 1973, Judge Chaplin issued his decision, reported at C.C.H. 1973-1974 O.S.H.D. para. 16,946, wherein he affirmed some citations and vacated others (see the chart summarizing the Judge's actions, OSHRC Decision, pps. 2-4); ruled on the various motions made by the Union as a party to the proceeding; and, noted with regard to the Union's participation in the case that he "was favorably impressed by the knowledge of the Act and standards displayed by Mr. Rafferty [safety director of the Union] and the enthusiasm with which he approaches safety and health in the workplace." (Administrative Law Judge Chaplin's Decision, p. 69).

6/ Compare Rule 21(a), 29 C.F.R. § 220.21(a) concerning intervention by non-parties. Participation by intervenors is subject to those terms and conditions imposed by the Commission or judge on granting the petition to intervene, 29 C.F.R. § 2200.21(c), and see Fed. R. Civ. P. kule 24. However, the rights of each party include the right to call, examine and cross-examine witnesses; to introduce into the record documentary or other evidence (29 C.F.R. 2200.52, 55(a), 68, 71 and 76), to file a brief, proposed findings of fact and conclusions of law on all issues raised during the course of hearings.

C. The Findings of the Occupational Safety and Health Review Commission

Both the Union and the Secretary petitioned the Commission to review various aspects of the Judge's Decision, but General Electric did not seek review of any portions of the Judge Chaplin's Decision. Review was granted, all parties filed briefs, and on April 21, 1975, the Commission issued a Decision affirming in part, and reversing in part, Judge Chaplin's Decision.

The Commission reinstated five (5) of the seven (7) citations that had been vacated by the Judge, adopting in part the arguments of fact and law submitted by the Union. These included findings that General Electric had violated the following standards: 27(f)-- bent ladder (OSHRC Decision, pps 36-39); 176(a) --unmarked aisles (OSHRC Decision, pps. 39-42); 27(b)(1)(iii)-- short ladder rungs (OSHRC Decision, pps. 20-22); 252(e)(1)(i) -- fall protection (OSHRC Decision, pps. 27-29); 22(a)(1)--tripping hazards (OSHRC Decision, pps. 32-34); and 23(c)(1)-- fall protection (OSHRC Decision, pps. 35-38).[7/] Penalties were accordingly assessed (OSHRC Decision, pps. 46-49).

7/ Also the Commission affirmed the Judge's Decision that the Complaint alleging a violation of 29 C.F.R. 1910.27(c)(4) should be classified as serious rather than non-serious (OSHRC Decision p. 15-20), and amended the pleadings, on motion of the Union, to conform to the evidence (OSHRC Decision, p. 42).

The Commission's findings concerning the two items here under review, 23(c)(1) and 133(a)(1), are discussed in parts II, D and E of this brief, infra pps. 20-31.

However, other Commission findings are relevant to its findings on the two matters on review here. Thus the Commission found the Company violated 252(e)(1)(i), a standard that requires protection for welders against falling while working on platforms, scaffolds, or runways. This particular standard is similar in all material respects to 23(c)(1), except that it is limited in application to welders (OSHRC Decision,p.36). The Judge had vacated the citation, finding that the particular work areas cited were not "platforms", but the Commission reversed,finding that the definition of platform contined in 29 C.F.R. 1910.21 (a)(4) applied "as a matter of plain meaning", and as "the purpose of the Act is to protect the health and safety of workers.... this purpose is not well served by reading a standard [as G. E. had argued] in a manner that detracts therefrom" but that "this purpose is best served by a broad construction of the word 'platform' in the standard (cases cited)" (OSHRC Decision, p. 28). The Commission noted that the regulation was drafted with as much exactitude as possible, and that a "reasonable person (would) recognize a hazard to a welder...of falling from a height exceeding 15 feet...(OSHRC Decision, p. 29).

The Commission also commented on the role of the Union in OSHRC proceedings in response to the Union's request for "other appropriate relief" provided in section 10(c) (29 U.S.C. Sec. 659(c)) of the Act. The Union had maintained that OSHRC should preclude the Company from continuing its unilateral approach to safety issues, and the Commission decided "to require consultation on matters of employee safety, which is limited to matters covered in affirmed citations." "Certainly, informing an employer of any failure to follow a standard is to be encouraged" (OSHRC Decision, p. 42-44). The Commission noted "that section 2(b)(2) (29 U.S.C. Sec. 651(b)(2)) states as one Congressional purpose of the Act that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions", and that the Senate Report notes that:

> "It has been made clear to the committee that the most successful plant safety programs are those which emphasize employees participation in their formulation and administration; every effort should therefore be made to maximize such participation throughout the industry." S. Rep. No. 91-1282, 91st Cong., 2nd Sess. 10(1970).

"We add that the Commission encourages employers to consult with affected employees and their representative on matters of safety and health" (OSHRC Decision, p. 44), and that "in appropriate cases, consultation will be considered in determining the good faith factor in the penalty computation" (OSHRC Decision, p. 45).

With regard to the assessment of penalties, the Commission noted that General Electric "has a history of both non-serious and serious violations which are final orders of this Commission spanning a fifteen-month period prior to the March 1973 inspection" (OSHRC Decision, p. 47)(See discussion in this brief, supra, pps. 5-8).

And finally, the Commission seriously questioned General Electric's 'good faith', finding that G.E. was aware of on-going violations and applied little or no additional effort to see that they were eliminated, as follows:

> "The 'good faith' of General Electric has been put into issue by the Union. The transcript reveals that its contentions are well taken. The Secretary established a substantial number of repeated safety violations. The Union presented its safety director who testified at length concerning company-union safety relations. He established there was no direct contact between mangement responsible for safety and the Union safety director. All such contact was instead channeled through Union relations personnel. Although all of the above was established, respondent did not call as rebuttal witnesses the two officials responsible for worker safety and health in Schenectady. The evidence further reveals that General Electric was aware of on-going violations, and applied little or no additional effort to see that they were eliminated". (OSHRC Decision, p. 47).

D. The Record Evidence Concerning General Electric's Violation of 23(c)(1)--Fall Protection

General Electric was cited for a willful serious violation of 23(c)(1), which provides:

> "(c) Protection of open-sided floors, platforms and runways. (1) Every opensided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder."

Three separate items were listed as violative of this standard and included in a single citation that issued as a result of the March 21-22 inspection.

The first item involved a "failure to provide protection against falling to an employee working on a 14 foot high horizontal stator frame, Bay H-17, by means of a standard railing or equivalent." Testimony and photographic exhibits confirmed the existance of all elements of the violation (Tr. 1-77-81, 546, 613; Ex. C-13; see also ALJ Decision, p.40) and, it was established that a fall, "would result in serious physical harm and possibly even death" (Tr. 1-614). The Judge found that stator frames were not platforms

to which the fall protection standard applied, and dismissed this item of the citation (ALJ Decision, p. 72,74). The Commission reversed, finding that workers on stator frames were to be protected (referring to its similar holding for welders on stator frames, 252(e)(1)(i))[8/], and thus sustained the violation (OSHRC Decision, pps. 35-36). The violation of this item was not deemed "willful" as there had been an ongoing dispute between the parties about application of standards to stator frames (OSHRC Decsion, p. 36). As G. E. has not appealed, this ruling on platforms has become a final order of the Commission (29 U.S.C.661).

The second item cited as a violation of 23(c)(1) was "Two work platforms six feet ten inches above the surrounding surface, Bay K-8 were not guarded on all sides by a standard railing". The testimony of CSHO's Nead and Bernard confirmed that a violation of 23(c)(1) existed (Tr. 1-82, 83, 156-157, 615-616; and see Ex. C-14). The CSHO's also testified to the dangers presented by this particular hazard, noting that workers on the platform could fall backwards to the ground due to the inadequate protection (Tr.1-688), or workers could fall or trip and "roll" out of the structure (Tr. 1-689); and, Union Safety

8/ See the discussion in this brief of 252(e)(1)(i) supra, pps. 7, 8 and 17.

director Rafferty noted that intense, 400 degree heat from hot metal castings exacerbated the need for worker protection (Tr. 1-669-670). The Judge found that "the alleged violations in Bay K-8 are clear" (ALJ Decision, p. 65); but he characterized the particular work platforms as scaffolds (ALJ Decsion, p. 40), and thus not covered by the standard (ALJ Decision, p. 72) and dismissed this item (ALJ Decision, p. 74).

The Commission reversed the Judge, finding that the workers on the platforms were covered by the standard intended to assure protection from falling, and thus sustained this second item of the citation (OSHRC Decision, pps. 35-36, 49). As G. E. has not appealed, this decision on the second item has become a final order of the Commission (29 U. S. C. 661(i)).

The third item of a willful serious violation of 23(c)(1) fall protection standards, and the only element of the citation for which G. E. seeks Court review, concerns a "Failure to provide a standard railing for a powered work platform No. 15836, Bay K-11 (Building 273), that can be elevated to a height of ten feet." CSHO Nead observed the platform in question during the inspection, noting that it had "absolutely no guarding whatsoever". He testified that a foreman on duty informed him that it was capable of being raised up to and over ten feet" (Tr. 1-87-90).

The platform was plainly visible to anyone in the immediate vicinity (Tr. 1-90). After questioning the supervisory personnel in the area as to the whereabouts of the required railings for the platform, it was determined that the railings were not only not being utilized, but were not available in the area (Tr. 1-87-88; 618). A G. E. representative (Weller) testified (Tr.2-48) that the platform was used about once a month (ALJ Decision, p.36).

Rafferty testified that it was not uncommon for employees working on the powered work platform in Bay K-11 to "weld angle iron to the job" as a "base"(Tr. 1-377, 473), that he had seen the device used at heights of 6, 8 and 10 feet, and on occasion had used it himself (ALJ Decision, p.34).

The hazards posed by a platform capable of rising to ten feet in this instance are clear. CSHO Bernard testified that a fall from the top of this platform while extended could cause "serious physical harm or death" (Tr. 1-620).

The Secretary classified the above three items of violations of 23(c)(1) as willful, and established that G. E. knowlingly and intentionally violated the standard. The record evidence in support of this allegation was simply overwhelming.

First, G. E. was issued citations for violations of 23(c)(1) on December 2, 1971 (Ex. C-1) and again on March 12, 1973 (Ex. C-4).

With regard to the citation issued in late 1971 (Ex.C-1), General Electric was charged with violating 23(c)(1) in the very same Building 273 that is involved in the present citation. In the earlier investigation of Building 273 which resulted in that citation, CSHO Bernard told the Company's management officials that he would only cite one or two instances of each violation and either point out other violations to them or leave it to their ability to find out where others existed, but that they should correct all situations throughout the workplace where workers were not adequately protected from falling. (Tr. 1-622). Thus, as early as 1971, Bernard apprised G. E. of the nature of 23(c)(1) violations, and the serious worker safety problems they pose. This conference, and what Bernard said, was fully corroborated by Rafferty (Tr. 1-384, 387). G. E. submitted no rebuttal testimony concerning these instructions and warnings.

Bernard returned for the March 21 and 22 inspections, however, and found similar violations of 23(c)(1) in Building 273 as detailed, supra, in the three separate items.

CSHO Nead testified that he had previously cited the Company for failure to have standard railings on platforms in Building 61 as a violation of 23(c)(1) (Ex. C-4). Nead also testified that Dave Guilbeault and Milton Rhodes accompanied

him on his earlier inspection (Tr. 1-91). It was Gilbeault who represented the employer in the March 21-22, 1973 inspection. Thus, the same G. E. representatives who accompanied inspectors in March 1973 had also been present on previous inspections that resulted in the citation in evidence as C-4 (ALJ Decision, p. 33). Clearly G. E. was aware of the existence of the standard.

Neither can G. E. claim that it was unaware of actual conditions existing at its Schenectady facility that violated 23(c)(1). As if two previous citations were not enough to warrant an investigation by G. E. officials of additional instances of insufficient guarding, the Union also exhorted the Company to comply with the standard (Tr. 1-379). On October 16,1972 and again on February 15, 1973, the Union Safety Director conducted inspections of Building 95 (Ex. C-16) and Building 60 (Ex.C-23) and informed G. E. thereafter of violations of the 23(c)(1) standard.[9/] Thus, Rafferty testified that he met with Mike Beaver a management official to complain of employees working on stator frames with no protection (Tr. 1-380). Rafferty also testified that he made an inspection in Building 60 on

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9/ The Union was acting within the scope of Sections 2(b)(1), (2) and (13) of the Act in bringing these violations to the attention of management representatives at G. E. See discussion in this Brief, supra pps. 9-15.

February 15 and 16, 1973, and found several violations of 23(c)(1) and brought them to management's attention (Tr. 1-380).

Furthermore, review of the testimony of employee Gary Kingsland, shows that the company was aware of the stator frame hazards. Kingsland testified he had told at least three foremen of the hazardous condition prior to the inspection (Tr. 504, 505). Kingsland also testified that scaffolding had been provided in the past (Tr. 505, 506), but only on request of an employee (Tr. 507), so that if the employee did not ask for scaffolding, it would not be provided (Tr. 507). The failure to provide employees with protection after the employer had been specifically advised of the hazard was willful in that the employer made no reasonable effort to eliminate the hazard and assure protection. The employer was aware of the hazard and violated its duty to correct it.

E. The Record Evidence Concerning General Electric's Violation of 133(a)(1)--Eye Protection

General Electric was issued a citation alleging a violation of 133(a)(1), which provides that:

> "(a) General. (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards."

The violation, classified as a serious repeat, with a proposed penalty of $2,000, was described in the citation as a:

> "Failure to provide suitable eye protection for two employees, Bay K-13 (Building 273), using a jack hammer to break up concrete."

CSHO Nead testified that during the March 21-22 inspection, he observed two employees using a pneumatic chisel, jack hammer, to break up a concrete floor, and neither employee was using the required eye protection (Tr. 1-71-73, 507), as follows:[10/]

10/ CSHO Nead also testified that Guilbault, a G. E. management representative that accompanied the OSHA inspection team, observed two employees without safety glasses, and instructed them "to cease the operations immediately until they got their eye protection on."(Tr.1-73). Since Guilbault was not called as a witness to refute Nead's testimony, a presumption exists that Guilbault's testimony would be adverse to G. E.'s case.

A. There were two of them, and one of them was operating the hammer and they had already broken up some of the floor, and the other one was standing down in the portion already broken and he was operating it, and breaking away the concrete.

Q. Now, when you say the employees were wearing no eye protection, what do you mean exactly? Be specific.

A. They are required to wear a goggle or a type of a glass that will protect the, any particles from the concrete flying up and entering into the eyes from top, bottom and the sides or the front, and they have got to be safety, and so they will not break. They can't let the dust or the concrete particles go into the eye. They must have the eye completely protected.

Q. Were these employees wearing any type of a glasses or goggles?

A. At the time I walked up to them neither one of them were wearing anything.

Q. You mean there was absolutely no protection on their eyes?

A. None whatsoever.

It is clear from Nead's testimony that he actually observed a compound violation of 133(a)(1), for he noted that the employees were not wearing any safety glasses, and equally as important, that the safety glasses that had been issued by the Company to its employees were inadequate under the standards, for they were not equipped with side-shields.

The absence of side-shields was confirmed by employee Henkel, one of the two employees involved in this incident, and not disputed by the General Electric. Thus, Henkel testified that he and his co-worker were not provided with adequate eye protection, namely side-shields, for their general construction type duties. Henkel unequivocally stated that all of the members of his work crew "have occasion to use jackhammers" and none of them was issued side-shields (Tr. 2-99), and that until a point after the issuance of the citation in question here, General Electric's employees never wore safety glasses that were properly equipped with shields (Tr. 2-99-100).

The requirement that side-shields be provided to employees is implicit in the 133(a)(1) standard which requires "a type of protector suitable for the work to be performed" (supra), and explicit in the provisions of the standard at 133(a)(6) that:

> "(6) Design, construction, testing, and use of devices for eye and face protection shall be in accordance with American National Standard for Occupational and Educational Eye and Face Protection, Z87.1-1968"

The American National Standard referred to in 133(a)(6) includes a selection chart indicating that for chipping concrete, either eyecups, goggles, or glasses with a side shield to prevent flying particles from the chipping operation are

required (Figure 8, p. 28 of ANZI Standard Z78.1-1968).

CSHO Bernard testified that the lack of eye protection in this case was construed as serious, due to the fact that "flying pieces of concrete" chipped away by a jack-hammer could severely injure the eyesight of the employees (Tr. 1-588).

And finally, the Company's violation of the 133(a)(1)--eye protection standard was classified as repeated. This was because the conditions giving rise to the issuance of the earlier citation, which became a final order of the Commission, occurred more than once.

It is undisputed that in December, 1971, G. E. was cited for a violation of 133(a)(1) and that this citation has become a final order, since G. E. chose not to contest it (Tr.1-589-590). At that time, employees involved in grinding and chipping concrete"...were wearing safety glasses but they did not have side shields"(Tr.1-590). Therefore, the glasses were not suitable within the meaning of the standard.

The Administrative Law Judge affirmed the citation for a serious repeat violation, finding that the two employees "were not wearing any protective eye glasses at the time of the inspection" (ALJ Decision, p.39, 61, 74), and that "since the same standard involving an almost identical factual situation was involved in the two violations there can be no

question but that they are repeated" (ALJ Decision, p. 61), but he reduced the penalty (ALJ Decision, p.62) because of G. E.'s overall safety program.

The Commission affirmed the Judge's Order, but reinstated the penalty proposed by the Secretary (OSHRC Decision, p. 23, 49), thereby rejecting General Electric's contentions that it was an absolute guarantor of its employees compliance (OSHRC Decision, p. 23). "Final responsibility for compliance rests with the employer"; the violation of 133(a)(1) was neither isolated nor unforeseeable; "the violations were preventable", and that General Electric's safety program has "not gone far enough" (OSHRC Decision, p. 23).

ARGUMENT

THE COMMISSION'S FINDINGS THAT GENERAL ELECTRIC COMMITTED A SERIOUS, REPEATED VIOLATION OF 133(a)(1) -- EYE PROTECTION, AND A WILFUL, SERIOUS VIOLATION OF 23(c)(1) -- FALL PROTECTION STANDARDS, ARE SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD, AND SHOULD BE AFFIRMED

The Intervenor Union understands that the Respondent Commission and Secretary will fully brief how the statute and legal precedents apply to the basic record facts and support the Commission's findings. As we do not wish to burden the Court by traversing the same ground twice, we therefore refer the Court to their brief for a full statement of that phase of the case.

However, as some issues raised by the Company are premised on misstatement of facts, and others relate to the role of employees and the Union in this proceeding, we will show how such misstatements are either unsupported or contradicted by this record, and how employee activities, consistent with the full party status guaranteed by the Act, lend further support to the Commission's findings.

A. The Record Belies G. E.'s Various Assertions That Its Violations of Safety Standards Were Isolated, That Its Conduct Could Not Be Properly Classified As Wilful and Repeated and That It Took All Possible Safety Precautions

The record evidence in this case simply provides no support for G. E.'s contentions that the Commission's Decision is based on only a few isolated and unrepeated incidents about which it had no knowledge.

For example, in discussing the Commission's finding that it violated the 133(a)(1) -- eye protection standard, G. E. states that "Nowhere in its opinion did the majority suggest a single safety measure which GE failed to take which might have prevented the violation" of 133(a)(1) (Petitioner's Brief, p. 11; see also p. 21 and 27).

G. E. goes on to assert that it had a good safety program. "Indeed, we believe that G. E.'s program in the area of eye protection fulfilled a higher standard of conduct than the highest the Commission was empowered to apply" (Petitioner's Brief, p. 24); that "G. E. has fulfilled all of its obligations under the standard"(Petitioner's Brief, p. 26); and, that G. E. "did all that was possible in the circumstances" (citing OSHRC Dissenting Opinion, p. 63). And, at one point G. E. even suggests that only by promulgation of additional standards under the Act could OSHRC assure G. E.'s compliance with its obligations (Petitioner's Brief, p. 29).

The Company would apparently have this Court overlook the testimony cited by the Commission in support of its finding of a violation at page 22, footnote 24 of its Decision which notes that the Secretary's "witnesses' uncontroverted testimony revealed that the two employees were breaking up concrete without the benefit of proper eye protection. They further testified that the hazard created by this activity could have been avoided by compliance with the standard. Moreover the employees were working out in the open and with reasonable diligence respondent (G.E.) could have known that they were not using proper eye protection".

Second, the witnesses' testimony recited in this brief, supra, pps. 27-31 , and referred to by the Judge in his Order (ALJ Decn. p. 31, 61, 74), reveals that by providing safety glasses with side shields, G. E. could have at least avoided the charge that it had not provided adequate protection for its employees.

Thus, G. E.'s assertion (Petitioner's Brief, p. 5) that it "furnished the requisite (eye protection) equipment ... to its employees", is simply unsupported on this record. In fact, it was found that the safety glasses furnished to the employees involved in the citation for G. E.'s violation of 133(a)(1) did not have side shields as required by the standard.

The Commission concluded that the hazard created by the Company's violation of the standard could have been avoided by compliance with the cited OSHA standard; and, that since the employees were working out in the open, the Company, with the exercise of reasonable diligence, should have known that they were not using proper eye protection (OSHRC Decision, p. 22, fn. 24). G. E. in its brief does not deny these essential facts (Petitioner's Brief, p. 12-14).[11/]

11/ G. E. cannot argue that it was unaware of the requirements of 133(a)(6), for in its brief to the Court (p.14) it refers to the oral testimony (Tr. 1-345, 402, 422, 451, 455) that safety glasses (including corrective lenses), are furnished . This requirement for corrective lenses appears in yet another subparagraph of 133(a), i.e., 133(a)(3)(i) to (iii).

Similarly misleading are G. E.'s statements about its violation of 23(c)(1). G. E. argues that there was no "proof of any hazardous conditions resulting from a failure to use the railings within the six-month limitation period provided in the Act" (Petitioner's Brief, p. 7), and that no time frame was established (Brief, p. 12, fn.13), but, this overlooks testimony of CSHO Nead that G. E.'s Superintendent in charge of Building 273 said the platform was used once a month. Furthermore, G. E. (Petitioner's Brief, p. 18) appears to perpetuate an inadvertence of the Administrative Law Judge in finding that Nead "did not know how high" the platform was elevated when in use (ALJ Decison, p. 33).

The fact is that the Company told Nead at the time of the inspection that it could be elevated to 10 feet (Tr. 1- 87-90). Nead testified that he asked a company foreman "the height that this platform could be raised to", and the foreman replied "over 10 foot, a little over 10 foot" (Tr. 1-89-90).[12/]

In describing the hazard presented to employees, Nead explained that an employee "could have very easily fallen off, up to and including a 10 foot level on the hard surface below and hurt themselves" (Tr. 1-90). Thus, it is clear that Nead while making the inspection knew precisely the height of the platform and that absent rails, it constituted a hazard.

In a further attempt to obfuscate the issues, General Electric (Petitioner's Brief, p. 19) places heavy reliance

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12/ G. E.'s contention (Petitioner's Brief, p. 49), that Rafferty's testimony was uncorroborated, is an allegation contradicted by the record, for Weller testified, as did Nead. Furthermore, G. E. chose not to submit any rebuttal testimony to that of Nead and Rafferty

on the testimony of its own building superintendent Weller who claimed that removable rails are provided for the platform in Bay K-11, and employees are instructed to install such railings prior to its actual operation. However, on cross examination, Weller was asked whether employees knew not to go up on scaffolding or platforms with inadequate and unsafe railings, and he admitted that employees have gone up on unsafe scaffolds (Tr. 2-74-75):

> Q How do they know whether it is unsafe?
>
> A They will question things if they feel they are unsafe.
>
> Q Do you tell them that it might be unsafe?
>
> A I can't say that we specifically tell them that it is a particular hazardous thing.
>
> Q Do you have literature which you distribute to the employees when they come to work or as they arrive at a particular job site which explains that a safe scaffolding might or might not be?
>
> A We go through a job hazard analysis with new employees coming into the area. Whether the job has it analysis for that particular job includes that, I can't tell you.

This testimony, in addition to contradicting that which G. E. so heavily relies on, reveals G. E.'s attitude that rather than assuring a work place free of hazards, they wait until employees "feel they are unsafe" (Tr. 2-75).

And finally, G. E. contends (Petitioner's Brief, p. 12) that the Commission rejected a credibility resolution made by the Judge at page 68 of his Decision. There was no credibility resolution made on that page relevant to the Commission's determination herein, for the Judge simply noted that G. E. had instructed its employees not to use the platform without the guard rails. What most impressed the Compliance Officers is that there were no guard rails to be found (Tr. 1-89):

Q. Now, did you make any inquiries as to whether or not they (G. E.) had a standard railing for this work platform?

A. Yes, I asked ...and he indicated that he thought he had seen it somewhere, and he asked around and nobody else seemed to remember ever seeing it, and they couldn't produce it, no one.

G. E.'s instructions to its employees to use devices that could not be located, like their instructions to use safety glasses without providing such glasses with side shields, reveals the paucity of evidence in support of their contentions that the Commission's findings should be overruled.

And finally, the Company, by claiming that it had good safety practices, would have this Court overlook specific findings of the Commission concerning not only its long history of violations of the Act, which are discussed and summarized in this Brief, supra pps. 5-8 and 16-20, but also the Commission's findings that question the "good faith" of the Company's activities since the passage of the Occupational Safety and Health Act of 1970. Specifically, the Commission found that G. E. was aware of on-going violations and applied little or no additional effort to see that they were eliminated, as follows:

> "The 'good faith' of General Electric has been put into issue by the Union. The transcript reveals that its contentions are well taken. The Secretary established a substantial number of repeated safety violations. The Union presented its safety director who testified at length concerning company-union safety relations. He established there was no direct contact between mangement responsible for

> safety and the Union safety director. All such contact was instead channeled through Union relations personnel. Although all of the above was established, respondent did not call any rebuttal witnesses the two officials responsible for worker safety and health in Schenectady. The evidence further reveals that General Electric was aware of on-going violations, and applied little or no additional effort to see that they were eliminated". (OSHRC Decision, p. 47).

In sum, as the record does not support and in fact contradicts the major factual premises of G. E.'s contentions on appeal, this Court should affirm the Commission's Decision, and should dismiss the appeal.

B. G. E.'s Effort to Shift Responsibility for Its Own Safety Violations to Its Employees, Particularly in View of the Record Evidence in This Case, Should be Rejected by This Court as Contrary to the Statutory Scheme

1. The Record Evidence Establishes that the Company Did Not Meet Its Responsibilities as Required by the Statute, to Comply With OSHA Standards

A basic element of G. E.'s argument to the Court appears to be that its employees, not the Company, should be held responsible for G. E.'s violations of the eye protection standards. Nowhere does the Company explain the apparent contradiction between this contention and its effort to denegrate the role of and discredit its employees' testimony concerning G. E.'s compliance with safety and health standards, a matter discussed hereinafter in this Brief, infra pps. 49-54.

G. E. says the issue of employee responsibility arises "with especial frequency in cases involving alleged violations cited against employers but predicated on employee misconduct -- most often cases based on the employee's failure to use safety equipment furnished by the employer or to follow employer-established safety practices " (Petitioner's Brief, p. 22). And, the Company expresses fear that "The Commission's approach . . . holds the employer strictly liable for hazardous conduct -- deliberate or otherwise -- of its employees even in cases where, as here, the employer has established and consistently applied an appropriate and far-reaching safety program to prevent such misconduct on the part of its employees" (Id., p. 23; see also pps. 21 and 27).

At this point the Intervenor will show the fallacies in the Company's assertions that the Company's violations are predicated on employee misconduct.

First, the Company's argument about employee responsibility is based on certain factual premises which the Intervenor has discussed hereinabove in this Brief, and established as unsupported by the record. Specifically, G.E.'s violation of the 133(a)(1) -- eye protection standard, included its failure to provide the right kind of safety glasses, i. e. safety glasses with side shields.

Second, as discussed hereinabove in the Brief, the record contradicts the Company's assertions that it in fact "has established and consistently applied an appropriate and far-reaching safety program", (supra, pps. 37-38).

Third, the Company has overlooked the statutory scheme of the Occupational Safety and Health Act of 1970 which clearly places the responsibility for compliance on employers.

In the genesis of OSHA, in its legislative history, and in the clear meaning of its provisions is the recognition that maintenance of safe and healthful working conditions is an inherent and necessary part of doing business, as much a part as, for example, the production or transportation of goods. Consistent therewith, it was determined by Congress that workplace safety must be as much a part of a business operation as any other part. Specifically, Congress placed upon the employer the burden of complying with the safety and health standards to be promulgated by the Secretary of Labor pursuant to OSHA. Thus, in the words of Senator Eagleton upon the final passage of OSHA in the Senate:

> "The costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business. Whether we as individuals are motivated by simple humanity or by simple economics, we can no longer permit profits to be dependent upon an unsafe or unhealthy worksite." 13/

Nor was there anything revolutionary in this Congressional determination that safe and healthful working conditions are a cost of doing business. That basic principle is well-rooted in antecedents of OSHA going back over a century. By the middle of the 19th century, the concept of employer responsibility for work-related injuries of employees led many states to enact legislation restricting employers' legal defenses in common law tort actions brought by employees who had been injured on the job. 14/ The opening of the 20th century was accompanied by the widespread enactment of workmen's compensation statutes, and the concept of employer responsibility became firmly implanted in the law:

> "Most radical of all [the objectives of workmen's compensation laws] was the establishment of a legal principle alien to the common law: liability without fault. The costs of work-related injuries were to be allocated to the employer, not because of any presumption that he was to blame for every individual tragedy, but because of the inherent hazards of industrial employment. Compensation for work-related accidents was therefore accepted as a cost of production" (emphasis added). 15/

13/ Legislative History of the Occupational Safety and Health Act of 1970, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, at pp. 1150-1151.

14/ The Report of the National Commission on State Workmen's Compensation Laws (G.P.O., 1972), at p. 34.

15/ Id.

With advances both in technology and in medical knowledge, the problem of occupational health and safety grew increasingly complex and workmen's compensation laws proved an inadequate solution:

> "Technological advances have produced unfamiliar and often indeterminable physical and toxic hazards. Occupational diseases associated with prolonged exposures to unsuspected agents or to fortuitous combinations of stresses have undermined the usefulness of the 'accident' concept. While advances in medical knowledge have facilitated the treatment of many injuries and diseases, they have also enlarged the list of diseases that may be work-related. Simple cause-effect concepts of the past have yielded to an appreciation of the many interacting forces that may result in impairment or death." 16/

Thus, the stage was set for OSHA, which established a comprehensive scheme focusing on the prevention and removal of hazardous conditions in the first instance rather than compensation for employees after injury has occurred. Here the notion of employer responsibility was taken a step further: employers must, under OSHA, prevent and remove hazardous conditions. By operation of law, the responsibility of providing safe and healthful working conditions in compliance with federal standards has become a part of the responsibility of doing business.

A cursory analysis of the overall scheme of the statute can leave no doubt as to the accuracy of this conclusion. First, the Act imposes two fundamental duties upon each employer covered by its terms:

16/ Id., at p. 35.

"(1) [the duty to] furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; [17]

(2) [the duty to] comply with occupational safety and health standards promulgated under this Act."

The entire thrust of the remainder of the Act is designed to put teeth into those fundamental duties of the employer. The general scheme of enforcement contemplates the Secretary of Labor first promulgating safety and health standards, whether on a permanent or temporary-emergency basis, with which employers must comply;[18] thereafter, the Secretary is to conduct meaningful inspections of employers' premises throughout the country to ensure such compliance;[19] finally, if, upon inspection, the

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[17] 29 U.S.C. § 654(a). In explanation of this "general duty" provision, the House Committee on Education and Labor observed:

"* * * Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(1) merely restates that each employer shall furnish this degree of care. There is a long-established statutory precedent in both Federal and state law to require employers to provide a safe and healthful place of employment. Over 36 states have these provisions, and at least four Federal laws contain similar clauses, including the Walsh-Healey Public Contracts Act, the Service Contract Act, and Longshoremen's and Harbor Workers' Act, and the Federal Employers' Liability Act.

"An employer's duty under Section 5(1) is not an absolute one. It is the Committee's intent that an employer exercise care to furnish a safe and healthful place to work and to provide safe tools and equipment. This is not a vague duty, but is protection of the worker from preventable dangers." H.R. Rep. No. 91-1291, 91st Cong. 2d Sess. at p. 21

[18] 29 U.S.C. §§ 654, 655.

[19] 29 U.S.C. § 657.

Secretary determines an employer has violated either a general duty or a specific standard, he shall impose on that employer enforceable citations, time limits to abate violations, civil penalties, and notice and posting requirements. [20]

More specifically, it is the employer who is obligated to comply with mandatory safety and health standards promulgated by the Secretary; [21] it is the employer who can be required to maintain records of employee exposure to potentially toxic or harmful physical agents; [22] it is the employer who can be required to "promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard and. . . to inform [that] employee. . . of the corrective action being taken;" [23] it is the employer who can be required in a standard promulgated by the Secretary to "use labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and proper conditions and precautions of safe use or exposure;" [24] and it is the employer who can be required either to make available or pay for medical examinations or other tests for all "employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure." [25]

20/ 29 U.S.C. §§ 658, 659. See also, 29 U.S.C. § 666.
21/ 29 U.S.C. §§ 654, 655.
22/ 29 U.S.C. § 657(c)(3).
23/ Id.
24/ 29 U.S.C. § 655(b)(7).
25/ Id.

In sharp contrast to the very broad imposition of employer responsibility described above, the Act imposes not a single legally enforceable duty upon employees.[26/] It would be contrary to the entire statutory mechanism, in view of the facts of this case, where it is established that safety glasses with side shields were not provided and railings for platforms were not available to shift responsibility for such violations to employees.

The question raised by G.E. is whether compliance with OSHA is part of its business. The answer, as we have seen, is clearly in the affirmative.[27/]

26/ The lone reference to an employee duty is the general injunction that:

> "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." 29 U.S.C. § 654(b).

This reference must be read as no more than an admonition to employees to cooperate with and assist the employer in complying with the latter's duties.

27/ Further, it can be of no significance that such compliance has become part of an employer's business by legal compulsion rather than by choice. Efforts to accomodate a legal duty are as much a part of an employer's business as any other, and employees engaged in such efforts must be deemed by the law to be working for the benefit of the employer.

Fourth, General Electric, by attempting to shift the responsibility to employees, raises the question of whether employees with malicious intent might intentionally create hazards during the course of an inspection, so that employers would be found in violation of the Act. 28/

The corollary, of course, is the extent to which employers might temporarily correct violations just ahead of inspectors, so as to avoid an OSHA citation. The following comments are in response to General Electric's contentions.

It should be made clear at the outset that there is no evidence in the present case that employees deliberately attempted to create hazards so that an OSHA violation would be observed during this or any other inspection conducted by OSHA or the Union. If an employee were sinister enough to purposely endanger the safety of his fellow workers, he would be subject to disciplinary or other action by the General Electric Company. It is undisputed that G. E. has the authority to issue a warning notice to any employee who does not follow the G.E. workplace rules, and such warning notices may lead to disciplinary action consummating in the discharge of the employee (Tr. A-345). 29/

28/ The Administrative Law Judge had also raised this question at the Hearing (Tr. 1-343 et seq.).

29/ It was in this sense, and in response to the Administrative Law Judge's concern at a bench conference that this counsel for the Union replied "at G. E. they are fired" for such activity. (See Tr. 1-343-345.)

In addition, the precise moment and location of inspections is not a matter of public information, and any person who gives advance notice of any inspection violates Sec. 17(f) of the Act. 30/ Workers are not informed as to what specific areas of the plant are to be inspected, nor are they told when an OSHA inspection is to take place. Consequently, if a worker wanted to take his chances and leave conspicuous violations of standards in plain view for an extended period of time with the hope that an OSHA compliance officer would come upon the scene, he most certainly would or should have been reprimanded by G. E. for his failure to comply with safety practices.

An extremely fast communication system would be necessary to inform workers of the movements of the OSHA inspection team, once in a building, so that hazards could be placed in the open as the Company suggests could happen. It would be no simple task for employees to leave their work posts to inform other workers about an oncoming OSHA inspection team. In fact, it would probably be a violation of work rules to do so. Rather, it would be more conceivable that management officials could utilize telephonic communication to inform its foremen of the precise movements of the inspection party so that OSHA violations could be corrected.

30/ Section 17(f) of the act provides that: "Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary of his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both."

Particularly important is that employers have the ultimate control over the workplace. It is employers who determine work schedules and whether enough dollars will be expended, sufficient time allocated, or adequate numbers of workers provided to assure safe work practices and the elimination of hazards. And, relevant to this particular case, it is the employer who assigns supervision over workers to assure safe work practices, and the employer who disturbs safety glasses that must be provided with safety shields, and who must provide railings for elevated platforms. It need not be gainsaid that in our economy employers gauge operations to maximize production and profits. The Union does not object to this principle; but, the Union does insist on a safe and healthy workplace, and the purpose of the Act is to assure just that.

And, finally, any worker who deliberately makes his place of work unsafe for other employees with a purpose of causing the issuance of an OSHA citation, is a menace to all workers and should be disciplined accordingly. The employer has the responsibility of safeguarding the health and safety of its employees, and must positively assert itself to that end. This Union has established that it will fully cooperate. If any employee would be foolish enough to risk his own safety and health, his own limb or life, and his future as a productive worker in our society in order to subvert legislation that workers have anxiously awaited for decades, then such employee would be properly subject to discipline by his employer and ostracized by his fellow workers.

In sum, it was G.E. that did not comply with the Act, and there is no evidence which would justify a finding by this Court shifting G. E.'s compliance responsibilities to its employees.

2. This Court Should Reject the Company's Contention that Testimony of Employees Should Not Be Relied Upon by The Commission

Without explaining the obvious contradiction with its argument, (discussed supra, pps. 39-48) that employees should be held responsible for G. E.'s violations of standards, the Company also contends that the role of employees concerned about safety and health should be severely restricted. Thus, G. E. suggests that the testimony of Union Safety Director Rafferty concerning the height and use of the platform for which the Company was cited as maintaining in a condition violative of the 23(c)(1) -- fall protection standard, should be discounted because he "was not a disinterested witness" and that he "had an interest in the outcome and was not a mere observer" (Petitioner's Brief, p. 50).

The Union has already shown how the statutory scheme of OSHA firmly places the responsibility of providing and maintaining a safe and healthy workplace on employers (see this Brief, supra, pps. 39-48). However, this is not to say that employees have no role in the enforcement of the Act. In fact, Congress envisioned a role for employees, and the Union has taken initiatives (see this Brief, supra, pps. 9-15) under the Act consistent with its statutory rights.

At the outset, it is necessary to examine the role of employees under OSHA as envisioned by Congress. The provision granting employee representatives participation rights first appeared in the committee version of Senate Bill 2193. Section 657(e) of Title 29 uses the exact language of the committee bill. S. Rep. No. 91-1282, 91st Cong., 2d Sess. 49 (1969), viz:

"...[A] representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace . . . for the puspose of aiding such inspections." id.

During the hearings on S. 2193, the subcommittee heard testimony indicating the need for a provision allowing employees to point out safety hazards to the inspector. As indicated by Mr. Anthony Semeraro, a factory safety chairman:

"I would like to have the inspector speak to the men on the job. The companies are covering too much, and I just hope we could expose some of the shenanigans going on." 31/

Sponsor of the bill, Mr. Williams of New Jersey, explained in debate the importance of this provision:

"This section reflects a fair and practical resolution of the conflicting viewpoint of employers who fear that an unlimited right of employees to accompany inspectors could lead to disruption of production operations and, the viewpoint of employees who urgently believe they need their representatives to participate and assist in the inspection which is so important to their continued protection on their job.

"I think this is an important point. Certainly no one knows better than the working man what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards. The opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair, and in arriving at the objectives of this legislation I think it is one of the key provisions of the bill presented to the Senate by the committee." 116 Cong. Rec. 37340 (1970).

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31 / Hearings on S. 2193 and S. 2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st & 2d Sess., pt. 1, at 812 (1970). See also id. at 796-97, 921-922, 940, 944.

The right of participation given to employee representatives was included in OSHA only after considerable debate in Congress, [32] where it was recognized that such employee participation might constitute a considerable employee instrusion upon what had theretofore been thought to be unrestricted prerogatives of the employer. Nevertheless, it was ultimately determined that employee participation would be of such benefit to the inspection process that the dimunition of employer prerogatives would have to be tolerated, as revealed in the Senate Report. [33]

> "During the field hearings held by the Sub-Committee on Labor, the complaint was repeatedly voiced that under existing safety and health legislation, employees are generally not advised of the content and results of a Federal or State inspection. Indeed, they are often not even aware of the inspector's presence and are thereby deprived of an opportunity to inform him of alleged hazards. Much potential benefit of an inspection is therefore never realized, and workers tend to be cynical regarding the thoroughness and efficacy of such inspections. Consequently, in order to aid in the inspection and provide an appropriate degree of involvement of employees themselves in the physical inspections of their own places of employment, the committee has concluded that an authorized representative of employees should be given an opportunity to accompany the person who is making the physical inspection of a place of employment under section 8(a)" (emphasis added.) id.

32/ The Senate adopted this provision rather than a substitute bill which would have granted employees the right to accompany the inspector only when the employer or his representative participated in the inspection. Cf. S. 4404, 91st Cong. 2d Sess. §9(b) (1970); see also Amendment No. 1056 to S. 2193, 116 Cong. Rec. 36530 (1970. The House version retained the language allowing employee representation only when the employer accompanied the inspector, H. R. 16785, 91st Cong. 2d Sess. §9(b) (1970, but the Senate language prevailed in the conference bill which was adopted by both houses and approved by the President. 116 Cong. Rec. 41756, 42208 (1970).

33/ Sen. Rep. No. 91-1283, 91st Cong. 2d Sess. at p. 11.

In sum, the statutory scheme provides that physical inspection of employers' premises is the key to the enforcement mechanism of OSHA (29 U.S.C. §657). Since OSHA compliance officers obviously cannot inspect all worksites across the country, physical inspections can be, and commonly are, initiated upon the request of an employee or employee representative (29 U.S.C. §657(f)). But in any event, Congress made explicit provision for the participation of employee representatives in the actual inspection of any workplace.

The role of the Union in this case was similar to that contemplated by Congress. It must be remembered that as more fully discussed in this Brief, supra pps. 5-15 , and as provided by the Act, (1) employee representatives, mindful of certain hazards on G. E.'s premises informed the Company, received no satisfactory response, and therefore requested the inspection in the first place; that (2), the employee participants in the inspection brought hazards to the attention of the inspectors, informed them about particular operations so that the inspector would not be left with a distorted picture of the nature of the hazards present, and raised questions about information being conveyed to the inspectors by the employer's representative; and that (3) as a result of the inspection, G. E. was cited for numerous serious, repeated and wilful violations of OSHA standards; and then (4) Union witnesses were called to corroborate the testimony of the OSHA inspectors at the enforcement proceedings. Clearly, the Company's argument that the Union's Safety Director's testimony should be discounted because he was not "disinterested" cannot be accepted, for it is wholly contrary to the entire statutory scheme.

Furthermore, to accept General Electric's effort to denigrate the role of the Union in pursuing its interest in having a safe and healthy workplace for all employees would literally fly in the face of the findings by the Administrative Law Judge in this case that:

> "I was favorably impressed by the knowledge of the Act and standards displayed by Mr. Rafferty [the Intervenor Union's Safety Chairman] and the enthusiasm which he approaches safety and health in the workplace." (ALJ Decision, p. 69).

And finally, insofar as G. E. might suggest that employees have no right to participate in OSHA enforcement proceedings, a Court ruling to that effect would run contrary to the statutory right of a party to fully participate in the proof and determination of all issues (29 U.S.C. §659(a)).

Party status in enforcement proceedings is part of the entire statutory scheme of involving employees in all proceedings where decisions affecting their health and safety are made, 29 U.S.C. §§651 (b)(1), (b)(2) (labor-management programs and bargaining), 655(petitions for rule-making),657(e) (walk-around rights),657(f) (complaint regarding workplace hazards). Furthermore, the importance of employee participation is emphasized where, as here, persistent Union efforts to secure "voluntary compliance" have been thwarted by employer apathy and resistance. (See this Brief, supra pps. 5-15). The active and well-informed union safety committee was not only responsible for initiating the original inspection in this case, it kept detailed records of safety and health violations it found at the worksite and reported these violations to the Responsdent. Some of these violations were later cited by the Secretary (Tr. 1-428). Just as Congress provided employees

with rights it could exercise against hazardous conditions maintained by employers, it also provided employees with a party status which did not make the effectiveness of its position dependent on the Secretary. 34/

Permitting the employee representative to present corroborating proof of a violation is required in order to preserve the function of full party status, and to assure that citations are not vacated without appropriate factual findings.

In sum, G. E.'s contention that the role of employees in the enforcement of OSHA should be limited must be rejected by this Court, for it would produce a result contrary to that specifically envisioned by Congress and made a part of the statutory scheme.

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34 / In Review Commission cases the Secretary's interests may not be identical with those of the authorized employee representative as indicated by section 10 of the Act, 29U.S.C. 265 (a)(1970). Therefore, Congress sought to alleviate this obvious conflict of interest in the Secretary's function by vesting the authorized employee representative with full party status as a check on any compromise, by the Secretary of the employee's right to a safe and healthful workplace.

CONCLUSION

For the foregoing reasons, the Commission's decision and order here under review should be affirmed and the citations of violations therein upheld, and General Electric's Petition for Review should be dismissed.

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March 19, 1976

Respectfully submitted,

Boren Chertkov

Winn Newman
Ruth Weyand
Boren Chertkov
1126 16th Street, N. W.
Washington, D. C. 20036
Telephone No. 202 296-1200

Counsel for Intervenors

CERTIFICATE OF SERVICE

Boren Chertkov, one of the attorneys for the Intervenor in Case No. 75-4116, certifies that on March 19, 1976, he served two copies of the Brief for the Intervenor, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, in No. 75-4116, on each of the parties in the above cases by mailing to them first class postage prepaid, addressed as follows:

Stanley Schair
Aranow, Brodsky, Bohlinger,
Benetar & Einhorn
Counsel for General Electric Company
469 Fifth Avenue
New York, New York 10017

William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review Commission
1825 K Street, N. W.
Washington, D. C. 20006

Michael H. Levin, Esquire
Nancy Sutherland, Esquire
Counsel for the Secretary
of Labor
U. S. Department of Labor
Room S4004
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Allen Sachsel, Esquire
U. S. Department of Justice
Civil Division
Appellate Section
10th and Pennsylvania Avenue, N.W.
Washington, D. C. 20530

Dated: Washington, D. C.
March 19, 1976

Boren Chertkov
Attorney for the Intervenor